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In the Supreme Court of the United States

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF MICHIGAN, PETITIONER

v.

GEORGE SUMMERS

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

The United States will discuss the following questions:

1. Whether any detention of an individual reasonably suspected of criminal activity, beyond a momentary stop for questioning, is unlawful in the absence of probable cause to arrest.

2. Whether, assuming that the detention of respondent in this case violated the Fourth Amendment, the exclusionary rule requires the suppression of evidence seized from respondent as the result of that detention.

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INTEREST OF THE UNITED STATES

This case presents an important constitutional question concerning the scope of police power, under the Fourth Amendment, to detain a person reasonably suspected of criminal activity in the absence of probable cause to arrest him. The specific question raised here is whether the police may lawfully detain a resident of a dwelling during the execution of a search warrant for narcotics. Each year, federal agents execute numerous search warrants at various types of premises. Both the Federal Bureau of Investigation and the Drug Enforcement Administration have expressly instructed their agents that, in executing search warrants, they may restrict the movements of persons found on the premises to be searched. The outcome of this case will govern the actions of federal law enforcement officers in executing premises search warrants.

Beyond the particular context of this case, the broader issue of the permissible scope of investigative stops is one that arises in a wide variety of situations and implicates interests of concern to federal law enforcement officers and prosecutors. Fedderal or state officers investigating crimes will often detain a suspect briefly to determine whether that person has engaged or is presently engaging in criminal activity. It is sometimes necessary in the course of such an encounter to obtain further information from different sources concerning whether an offense has been committed or whether the suspect is sufficiently connected with the commission of an offense to warrant his arrest. Whether the detention of a suspect for a limited but more than momentary period in these situations is per se violative of the

Fourth Amendment, or depends for its legality on an assessment of the reasonableness of the officers' actions in the particular circumstances, is a matter of considerable importance to federal law enforcement activities.

STATEMENT

Respondent was charged in the Recorder's Court of the City of Detroit with possession of heroin, in violation of former Mich. Comp. Laws § 335.341(4)(a) (Mich. Stat. Ann. § 18.1070(41)(4)(a) (1972)).[1] He moved prior to trial to suppress the heroin seized from his person at the time of his arrest. The trial court granted the motion to suppress, and both the Michigan Court of Appeals and the Michigan Supreme Court affirmed (Pet. Apps. A and B).

1. The evidence showed that on October 10, 1974, Detroit police obtained a warrant authorizing them to search for heroin and other narcotics at a dwelling located at 9356 Mansfield. In the accompanying affidavit, Officer Roger Lehman stated that on the previous day a reliable informant had purchased a quantity of heroin at the house from an individual named "George" (J.A. 60-61).[2] After obtaining the warrant, a team of Detroit police officers went to the premises to execute the warrant.

As the police approached the house, respondent was observed exiting the premises (H. Tr. 4-5, 29-30).[3] Patrolman Lehman identified himself as a

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[1] The statute under which respondent was charged has since been repealed and recodified. 1978 Mich. Pub. Acts, No. 368 (effective Sept. 30, 1978).

[2] "George" was described "as being approx 31-33/5-10/170/med bld/med complx/and wearing his hair cut short" (J.A. 61).

[3] "H. Tr." refers to the transcript of the preliminary examination held on October 22, 1974.

police officer, displayed a copy of the search warrant, and asked respondent whether he lived in the house. When respondent answered in the affirmative, Officer Lehman told him to open the front door. Respondent stated that he had left his keys inside and would summon someone over the intercom to open the door (H. Tr. 5). At respondent's request, co-defendant Dwight Calhoun appeared at the front door. Officer Lehman identified himself to Calhoun as a police officer and attempted to open the storm door, which was locked. Calhoun thereupon slammed the inside door shut (H. Tr. 6).

After several other officers forcibly broke down the doors, Officer Lehman observed Calhoun fleeing toward a downstairs bedroom (H. Tr. 7). Before giving chase, Lehman told a fellow officer, Anthony Conant, to bring respondent inside the house (H. Tr. 25, 31-32, 33, 34). Lehman then pursued Calhoun into the bedroom and arrested Calhoun after observing him toss onto a bed a package containing a substance believed to be heroin (H. Tr. 7-8).

Calhoun and five or six other individuals who were inside the house were brought into the living room, where they were detained together with respondent while the officers searched the house (H. Tr. 15, 25, 26-27, 34-35). In the basement Officer Conant discovered two plastic bags containing what appeared to be narcotics. After Officer Conant ascertained that respondent owned the house and lived in it, he arrested respondent. A search incident to the arrest uncovered a quantity of heroin in the pocket of respondent's jacket (H. Tr. 27). It was this heroin that formed the basis of the charge against respondent.

2. In suppressing the evidence, the trial court found that respondent did not reenter the premises voluntarily when he accompanied Officer Conant into the house (M. Tr. 2).[4] In addition, the court concluded that the police lacked probable cause to arrest respondent in connection with the drugs found in the basement and that therefore the heroin found on respondent's person was the fruit of an illegal arrest (M. Tr. 2-3, 9).

The Michigan Court of Appeals affirmed (Pet. App. 1-14). It rejected the prosecutor's arguments that the search of respondent's person was authorized by the warrant to search the premises, and was, in any event, necessary to prevent frustration of the warrant (*id.* at 5-7). The court also rejected the argument that there was probable cause to arrest respondent following the discovery of drugs in the basement. Accordingly, it agreed with the trial court that the heroin seized from respondent was inadmissible as the fruit of an illegal arrest (*id.* at 7-12).

The Michigan Supreme Court also affirmed, three judges dissenting (Pet. App. 15-42). The court ruled (*id.* at 17-18, 22) that Officer Lehman's initial encounter with respondent outside the house was proper under *Terry* v. *Ohio*, 392 U.S. 1 (1968). However, relying on *Dunaway* v. *New York*, 442 U.S. 200 (1979), it held that the "further detention" of respondent "by bringing him into the house," was a seizure of respondent that was unsupported by probable cause and therefore violated the Fourth Amendment (Pet. App. 18). The court read *Dunaway* to hold (Pet. App. 18; emphasis in original) that

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[4] "M. Tr." refers to the transcript of the proceedings with respect to the suppression motion, held on November 19, 1974.

> detention of a citizen beyond the narrow scope of *Terry* v. *Ohio*, *supra*, and its progeny, is reasonable only if supported by probable cause for arrest. *Thus, the general standard for determining whether a seizure-detention is legal is not whether the police officer's actions were reasonable under the circumstances but rather whether the police officer had probable cause to arrest.*

Since, in the majority's view, the detention of respondent during the execution of the warrant amounted to an arrest and the police did not then have probable cause to believe that respondent had committed a crime, it held that the heroin taken from respondent had to be suppressed as the fruit of an unlawful arrest (Pet. App. 22-23).

The dissenters concluded that under *Terry* v. *Ohio*, *supra*, and its progeny, the transfer of respondent from the porch into the house and his subsequent detention during the execution of the warrant were reasonable under the circumstances,[5] that the police had probable cause to arrest respondent following the discovery of drugs in the basement, and that the heroin found on respondent's person was properly seized incident to a valid arrest (Pet. App. 27-42).

SUMMARY OF ARGUMENT

I

A. In the view of the majority of the Michigan Supreme Court in this case, the permissible scope of a

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[5] The dissent found that the decision to move respondent inside the house and detain him there was an on-the-spot response to an exigent situation, that it was justified by security considerations, and that the limited intrusion was reasonably tailored to accommodate the officers' legitimate safety concerns (Pet. App. 34-38).

"*Terry* stop" [6] is limited to a momentary detention for brief questioning. The court stated that if the detention is more than momentary, its lawfulness is not to be assessed by the reasonableness of the officers' action under all the circumstances confronting them, but solely by whether the officers had probable cause to arrest (Pet. App. 18). Accordingly, the court refused to find that the detention of respondent while the warrant was executed constituted a seizure "less intrusive than a traditional arrest, * * * the constitutionality of [which] involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979). Rather, it read *Dunaway* v. *New York*, 442 U.S. 200 (1979), to establish that any but the briefest detention must be treated as an arrest requiring probable cause.

We acknowledge *Dunaway's* holding that, even though there may be no formal arrest, certain seizures constitute such a substantial invasion of personal liberty that they are deemed unreasonable in the absence of probable cause. But in *Dunaway* the detention was of approximately two hours' duration, involved transportation of the suspect to the police

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[6] See *Terry* v. *Ohio*, 392 U.S. 1 (1968). The precise meaning of the term "*Terry* stop" is not inherently clear, and it is possible that different users of the term have different meanings in mind. The most appropriate definition in our view, and the meaning we attach to the term when used in this brief, is a seizure of the person that must be supported by reasonable suspicion but that is not of such magnitude as to require probable cause. The issue in this case is whether the detention of respondent was within the proper confines of that concept.

station, and was undertaken for the purpose of interrogation. And while we think that detentions of lesser duration and severity than in *Dunaway* may nevertheless be of sufficient magnitude to be treated as arrests requiring probable cause, we do not believe that *Dunaway* supports the conclusion that police officers possessing reasonable suspicion short of probable cause may never detain a suspect for a limited period of time (for example, in order to check a computer to see if a suspected car thief's vehicle is listed as stolen, or to bring the victim of a robbery over to see if the suspect is identified as the robber).

In sum, while the line that separates a permissible investigative detention from a detention equivalent to an arrest and requiring probable cause is not yet clearly defined, it is our submission that the line is not where the Michigan Supreme Court drew it, and that extended detentions of limited duration can comport with the demands of the Fourth Amendment if they are reasonable in light of the circumstances confronting the officers at the time.

B. So far as we are aware, the record in this case does not establish the duration of respondent's detention while the officers were executing the search warrant or whether the officers acquired any additional information, during this period of detention but prior to completion of the search, that may have supplied probable cause. Accordingly, we find it difficult to reach any conclusion as to whether the detention of respondent was of sufficient severity to require probable cause. Moreover, even assuming the detention was within the boundaries of a permissible *Terry* stop, the court below never passed upon the reasonableness of the officers' actions in the particular circumstances of this case. (Given its narrow view of the permissible

scope of a *Terry* stop, there was, of course, no need for the majority below to inquire into such matters.) Accordingly, if this Court agrees with us that the Michigan Supreme Court has adopted an improperly narrow view of the permissible scope of a detention based on reasonable suspicion, it may wish to remand this case for further consideration by the state courts under a proper standard.

II

In holding that the heroin seized from respondent was inadmissible because it was the fruit of an illegal detention, the Michigan Supreme Court relied heavily on this Court's decision in *Dunaway* v. *New York*, 442 U.S. 200 (1979). But the search and seizure in this case took place in 1974, not only prior to the decision in *Dunaway* but also before that in *Brown* v. *Illinois*, 422 U.S. 590 (1975), in which the Court condemned an investigative detention of a suspect at a police station for purposes of custodial interrogation. Accordingly, because the police did not and could not reasonably have known that their actions in detaining respondent during execution of the search warrant violated the Fourth Amendment, we submit that, under traditional retroactivity principles, the purposes of the exclusionary rule would not be served by suppressing the evidence that was obtained as a result of that detention. In view of this, we believe there is no occasion for the Court in this case to consider the broader question of a general "good faith" exception to the exclusionary rule.

ARGUMENT

I. THE FOURTH AMENDMENT PERMITS INVESTIGATIVE DETENTIONS OF MODEST DURATION, ON THE BASIS OF REASONABLE SUSPICION OF CRIMINAL ACTIVITY, WHEN SUCH DETENTIONS ARE REASONABLY NECESSARY TO FURTHER PROPER LAW ENFORCEMENT OBJECTIVES

The question raised by the specific context of this case—the right of the police, on the basis of reasonable suspicion not amounting to probable cause, to detain a resident of a dwelling while it is searched for narcotics pursuant to a valid search warrant—is one of considerable practical significance. While we believe that such detentions—if of appropriately limited duration—are often proper under the Fourth Amendment, we do not here urge the Court to adopt any blanket rule on the subject. Rather, we suggest that the police action should be assessed in terms of the particular factual circumstances confronting them in any specific case. Indeed, because the Michigan Supreme Court's decision in the present case is not based on any such analysis, this Court may prefer, if it agrees with us that the decision below was based on a fundamental error in analytic approach, to remand the case for consideration by the state court under appropriate standards.

The basic issue in this case sweeps more broadly than the specific context of detentions during the execution of search warrants, implicating the general standards for assessing the lawfulness of investigative detentions of individuals suspected of criminal activity. A proper identification of the nature of the issue begins with a delineation of what has been settled by prior decisions of this Court. At one end

of the spectrum, it is settled that a seizure of the person (*i.e.*, a forcible restraint of the individual's freedom of movement) is ordinarily prohibited in the absence of reasonable suspicion of criminal activity. See *Terry* v. *Ohio*, 392 U.S. 1 (1968); *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); *Delaware* v. *Prouse*, 440 U.S. 648 (1979); *Brown* v. *Texas*, 443 U.S. 47 (1979); *United States* v. *Mendenhall*, No. 78-1821 (May 27, 1980); cf. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). While the precise contours of the "reasonable suspicion" criterion remain to be fleshed out (*e.g.*, *United States* v. *Cortez & Hernandez*, No. 79-404), its role as a demarcation point of police powers is clear.

At the other end of the spectrum are detentions of such duration or severity that they may be undertaken only if probable cause exists to believe that the detained individual has committed a crime. The classic example of such a detention is a traditional arrest, but as is clear from *Dunaway* v. *New York*, 442 U.S. 200 (1979), the formal label attached by the police is not the dispositive factor. Rather, probable cause is required whenever there is a sufficiently substantial invasion of the suspect's freedom of movement. What constitutes a "sufficiently substantial" deprivation of liberty to require probable cause remains to be fleshed out—in part, of course, by the instant case. If, however, a detention is deemed to be of sufficient severity to fall within this category, its lawfulness will not be evaluated by reference to a general reasonableness analysis, but will ordinarily depend solely upon the existence of probable cause (*i.e.*, a detention of this character is deemed unreasonable per se in the absence of probable cause, much as a search of a house is ordinarily deemed

unreasonable per se in the absence of a search warrant).

Between these two points of demarcation are detentions that, while constituting a Fourth Amendment "seizure" of the person, are not so intrusive as to require probable cause. The lawfulness of such detentions is assessed by a general reasonableness standard, weighing all of the pertinent facts and circumstances. As the Court stated in *Brown* v. *Texas*, *supra*, 443 U.S. at 50-51, "[t]he reasonableness of seizures that are less intrusive than a traditional arrest, see *Dunaway* v. *New York*, 442 U.S. 200, 209-210 (1979); *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968), depends 'on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.' *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977); *United States* v. *Brignoni-Ponce*, [422 U.S. 873, 878 (1975)]. Consideration of the constitutionality of such seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." See *Rawlings* v. *Kentucky*, No. 79-5146 (June 25, 1980) slip op. 11 n.5. The intrusion must serve a legitimate governmental interest, must be reasonably related in scope to the purposes that justified the intrusion, and must be based on specific, articulable facts. See *United States* v. *Mendenhall*, *supra*, slip op. 2 (Powell, J., concurring); *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 880-882; *Adams* v. *Williams*, 407 U.S. 143, 146-149 (1972); *Terry* v. *Ohio*, *supra*, 392 U.S. at 20-22.

In the view of the majority of the Supreme Court of Michigan in this case, the foregoing analysis may

be applied only to the limited class of cases involving a momentary detention of a suspect for questioning. Any detention of more than a minute or two (or perhaps any involving physical movement of the suspect) requires probable cause and, in the absence thereof, is unlawful regardless of its reasonableness (see Pet. App. 18). This view we believe to be fundamentally unsound. As we show below, it is inconsistent with the Court's general approach to this aspect of Fourth Amendment law, it unjustifiably restricts appropriate and legitimate law enforcement activities, and it is not required by this Court's decision in *Dunaway*.

A. The Michigan Supreme Court's Standard For Determining Whether An Arrest Has Occurred Is Incorrect

In *Terry* and subsequent cases the Court has held that police officers may briefly detain a person for investigative purposes on less than probable cause, if they have a reasonable suspicion that the individual is engaged in criminal activity. The Court explained the rationale underlying this rule in *Adams* v. *Williams*, *supra*, 407 U.S. at 145-146:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response. * * * A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be

most reasonable in light of the facts known to the officer at the time.

It is often necessary for the police in the course of a *Terry* stop to utilize investigative methods other than interrogation to determine whether there is a sufficient basis to arrest the suspect for a criminal offense. Both federal and state courts have been confronted in a wide variety of settings with questions concerning the propriety of detentions for more than the "brief" or "momentary" period alluded to in *Adams*. We think it unjustifiably precludes legitimate police investigative activities, as well as offending the Fourth Amendment's core concept of reasonableness, to condemn such limited but more than momentary detentions as automatically illegal without regard to the facts and circumstances that may justify them.

For example, where an officer stops an individual on the basis of reasonable suspicion that criminal activity is afoot, can the individual be detained for several minutes while a computer check is run to determine whether there are any outstanding warrants against him? See, *e.g.*, *People* v. *Higbee*, 37 Cal. App. 3d 944, 112 Cal. Rptr. 690 (1974); *Clark* v. *State*, 358 N.E.2d 761 (1977).[7] Where an officer stops a suspect near the scene of a robbery that has just occurred, does the officer need probable cause in order

[7] See also *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (agents stopped individuals suspected of drug smuggling as they were about to depart on private airplane, and suspects' responses created added suspicion that the plane was stolen; court held that suspects could be detained for more than one hour while agents checked with Federal Aviation Administration to determine whether the plane was stolen).

either to return the suspect to the scene for identification, or to detain the suspect for a few minutes while the victim arrives to make an identification? See, *e.g.*, *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978); *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *People* v. *Harris*, 15 Cal.3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 (1975). Where an agent has reasonable suspicion but not probable cause to believe that an airplane passenger's bag contains narcotics, can he detain either the passenger or the bag while a drug-detecting dog is brought to the area? See *United States* v. *Klein*, 626 F.2d 22 (7th Cir. 1980); *United States* v. *West*, 495 F. Supp. 871 (D. Mass. 1980). Where a truck suspected to be stolen is stopped on a highway at night during a blizzard, can the police take the truck and the driver to a nearby police station where lighting conditions will permit an inspection of the truck to compare it with the description of the one that has been stolen? See *Marcello* v. *United States*, No. 78-1538 (10th Cir. Feb. 20, 1980), cert. denied, No. 79-1688 (Oct. 6, 1980); cf. *United States* v. *Harris*, 404 F. Supp. 1116, 1127 (E.D. Pa. 1975).

Although the detention in each of the foregoing examples is more than momentary, we submit that there is no per se rule invalidating them in the absence of probable cause, as the court below held. Rather, the lawfulness of such detentions should be determined on a case-by-case basis by balancing "the degree to which the seizure advances the public interest" against "the severity of the interference with individual liberty." *Brown* v. *Texas*, *supra*, 443 U.S. at 51. As one leading commentator has observed:

> Sometimes the officer will communicate with others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale.

3 W. LaFave, *Search and Seizure, A Treatise On The Fourth Amendment* 36-37 (1978) (footnotes omitted).

The Michigan Supreme Court appears to take the position that under the Fourth Amendment any intrusion beyond a brief or momentary *Terry* stop is equivalent to an arrest requiring probable cause, even where the intrusion may be modest in scope and reasonably related "to the circumstances which justified the interference in the first place." *Terry* v. *Ohio*, *supra*, 392 U.S. at 20. We believe that this decision ignores the everyday realities of police-citizen encounters. As we have just shown, there are numerous situations in which the officer's suspicions may not be resolved but may be further aroused as a result of questioning a suspect during a *Terry* stop. If any further detention of a suspect for investigation were prohibited in the absence of probable cause, no matter how

limited the intrusion on personal freedom and regardless of the reasonableness of the detention, legitimate law enforcement efforts would be seriously hampered.

The decision in *Dunaway* v. *New York*, *supra*, upon which the court below so heavily relied, does not support its analysis of the Fourth Amendment issue presented here. In *Dunaway*, on the basis of a lead that suggested Dunaway's involvement in a murder but did not establish probable cause to arrest, three police detectives were ordered to "pick up" Dunaway and "bring him in." The detectives located Dunaway at a neighbor's house, placed him in a police car, and drove him to police headquarters. Although he was not told that he was under arrest, he was placed in an interrogation room and subsequently questioned by officers after having been advised of his *Miranda* rights. Dunaway was detained for about two hours from the time the police picked him up until the time he confessed.

Even though Dunaway had not been formally arrested, the Court ruled that his detention violated the Fourth Amendment because it was not supported by probable cause. *Dunaway* thus makes clear that some intrusions upon the freedom of an individual are of such a magnitude that they require probable cause under the Fourth Amendment, whether or not they are technical arrests. As was recognized in *Dunaway* (442 U.S. at 208-211), however, other seizures within the purview of the Fourth Amendment, analogous to the intrusions in *Terry* and its progeny, do not require probable cause.

The problem presented by cases such as the present one is in determining where to draw the line between those intrusions that are sufficiently limited that they may be analyzed in terms of the reasonableness of the officers' justification for the particu-

lar detention and those intrusions that are sufficiently substantial that probable cause (rather than a generalized showing of reasonableness) is required to support them. In his concurring opinion in *Dunaway*, Mr. Justice White pinpointed the dilemma (442 U.S. at 219-220):

> The opinion of the Court might be read to indicate that *Terry* v. *Ohio*, 392 U.S. 1 (1968), is an almost unique exception to a hard-and-fast standard of probable cause. As our prior cases hold, however, the key principle of the Fourth Amendment is reasonableness—the balancing of competing interests. * * * But if courts and law enforcement officials are to have workable rules, * * * this balancing must in large part be done on a categorical basis—not in an ad hoc, case-by-case fashion by individual police officers. * * * On the other hand, the need for rules of general applicability precludes neither the recognition in particular cases of extraordinary private or public interests, * * * nor the generic recognition of certain exceptions to the normal rule of probable cause where more flexibility is essential. * * * It is enough, for me, that the police conduct here is similar enough to an arrest that the normal level of probable cause is necessary before the interests of privacy and personal security must give way.

The determination whether, in a given case, police conduct involves a sufficiently substantial interference with personal security to require probable cause depends on consideration principally of the duration of the intrusion, but perhaps also its severity in other respects. The detention in *Dunaway* lasted for two hours but might have continued indefinitely if Dunaway had not made an incriminating statement.

On the basis of duration alone, the detention thus appears to have been sufficiently intrusive to require probable cause. Moreover, the physical move in *Dunaway*—involving a drive to the police station—was also extremely intrusive. The psychological impact of being herded into a police car, taken to police headquarters, and placed in an interrogation room is quite severe.[8]

The purpose of a detention may also be important in drawing the line at which probable cause will be required. Detentions for the purpose of custodial interrogation may appropriately be more strictly limited than those to facilitate investigation by other means. This is so in part because of the unstructured and potentially open-ended nature of the interrogation process, and because the possibility of obtaining a confession may increase in direct proportion to the length of the detention. See *Dunaway* v. *New York*, *supra*, 442 U.S. at 220 (Stevens, J., concurring). *Dunaway* involved custodial interrogation. Dunaway was taken to an interrogation room at the police station, given *Miranda* warnings, and questioned for about an hour (see 442 U.S. at 203 n.2; *People* v. *Dunaway*, 61 App. Div. 2d 299, 303, 402 N.Y.S. 2d 490, 493 (1978) (Denman, J. concurring)) before he made an incriminating statement. The Court in *Dunaway* cited passages from its decisions in *Davis* v. *Mississippi*, 394 U.S. 721 (1969), and *Brown* v. *Illinois*, 422 U.S. 590 (1975), as "reflect[ing] the conclusion that detention for custodial interrogation—regardless of its

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[8] On the other hand, we believe that it would be appropriate—and not overly intrusive—in certain situations for the police to move a suspect to a different location (*e.g.*, to be identified by witnesses to a crime that has just occurred, or to be protected from a hostile crowd).

label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." 442 U.S. at 216.[9]

While *Dunaway* says something about the kind of detention that is sufficiently intrusive that it must be supported by probable cause,[10] there is obviously a wide array of detentions that are materially less intrusive than that to which Dunaway was subjected, yet at the same time more substantial than the momentary stop for brief questioning that is all the Michigan Supreme Court believes the Fourth Amendment permits police officers possessing a reasonable suspicion short of probable cause. Whatever may be the point at which probable cause should be required because of the concerns adverted to by Justice White in his concurrence in *Dunaway* (see page 17, *supra*), the extremely restrictive view taken by the court below is not justified. Particularly where the

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[9] As this Court recently observed, the safeguards established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), stemmed from the Court's concern "that the 'interrogation environment' created by the interplay of interrogation and custody would 'subjugate the individual to the will of his examiner' and thereby undermine the privilege against compulsory self-incrimination." *Rhode Island* v. *Innis*, No. 78-1076 (May 12, 1980), slip op. 7. Thus, " '[i]nterrogation,' as conceptualized in the *Miranda* opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself." *Id.* at 8.

[10] We note that the detention in *Dunaway* probably could not have survived scrutiny even under a pure reasonableness standard. There was, after all, little legitimate police need that could be advanced to explain why Dunaway could not have been detained and questioned where he was found, or at some nearby location, rather than being taken to the police station, and, after a considerable delay, questioned in an interrogation room.

detention is not for the purpose of interrogation, but to pursue some relatively brief independent line of inquiry that may establish the detained individual's probable complicity in a crime, we believe that a proper balance of individual and societal interests requires that the police be permitted to extend the detention beyond the brief moment that the Michigan court would permit. The situations described earlier in our brief (pages 13-14, *supra*) are good illustrations of the kind of police investigative detention that we believe the Fourth Amendment permits, provided the detention is of appropriately limited duration and severity.

The latitude that police would be accorded by permitting limited detentions on the basis of founded suspicion would not leave them in an unstructured wilderness that is likely to lead to serious abuses. First, the power to engage in any kind of forcible detention is limited by the requirement that the police possess specific and articulable grounds for suspecting the individual of unlawful activity. Second, the police will know that any detention beyond a momentary stop must be supported by a specific and articulable purpose that justifies the added imposition on the individual's freedom. Finally, as the courts define the line in cases such as *Dunaway*, the police will also learn that relatively clear outer limits exist to define the power to detain in the absence of probable cause.[11]

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[11] We are not as skeptical as some of the ability of police, within defined boundaries, to make judgments about the reasonableness of a proposed course of conduct. Such kinds of judgments are in many respects the essence of everyday police work. Officers must assess citizen complaints and decide whether police intervention in a vast range of incidents is appropriate. They must make judgments about how to

While it no doubt supplies even greater clarity, the extremely restrictive line drawn by the Michigan Supreme Court bars far too many legitimate and reasonable police investigative detentions to conform to the Fourth Amendment's fundamental philosophy. As a number of prominent authorities have recognized, the police ought properly be permitted to extend detentions based on reasonable suspicion for some period beyond the initial encounter, if circumstances justify such action. The *ALI Model Code of Pre-Arraignment Procedure* § 110.2(1) (Proposed Official Draft 1975), for instance, recognizes that extended detentions should be authorized, but suggests a specific limit of 20 minutes, beyond which a stop based on reasonable suspicion should not be extended.[12] Professor LaFave concludes that the permissibility of extending a *Terry* stop should turn on "whether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval. This, in turn, may depend upon such things as the relative seriousness of the offense being investigated and whether the police are inching closer to having probable cause for arrest * * *." 3 W. LaFave, *Search and Seizure*, *supra*, at 40.

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allocate their resources in pursuing both criminal investigations and community caretaking functions. The nature of their experience and responsibilities demands that they develop a facility for making the kinds of judgments that we think they should be permitted to make in determining whether a suspect should be detained.

[12] While we acknowledge that there is some value to having a specific time limit of the kind proposed by the ALI, we are not at all certain that the establishment of a specific time limit is an appropriate exercise of judicial power.

In sum, whatever may be the outer limits of a permissible detention on reasonable suspicion short of probable cause, we urge the Court to reject the proposition that nothing more than a momentary stop is permissible. Within appropriate outer limits, the lawfulness of an extended *Terry* stop should be measured by the substantiality and rationality of the officers' justification for undertaking it. The inquiry would focus on the purpose of extending the detention—*i.e.*, the specific course of action that the police propose to undertake during the period, and the degree of likelihood that these actions will produce confirmation of their suspicions—and would also consider such factors as the gravity of the offense under investigation, the risk that it will prove difficult subsequently to apprehend the suspect should he be released, the substantiality of the officers' suspicions, the degree of inconvenience caused to the suspect by the detention, and, of course, considerations relating to the officers' personal safety.

B. The Court Should Not Attempt To Pass Upon The Legality Of Respondent's Detention

As we have shown, the Michigan Supreme Court erred in concluding that any seizure that is more intrusive than a momentary *Terry* stop is equivalent to an arrest requiring probable cause. In our view, the Fourth Amendment does not invariably bar the police from detaining a suspect for a more extended period in order to ascertain whether there may be probable cause to arrest that person for commission of a felony. Thus, we believe that, as a general matter, when executing a search warrant for contraband at private premises, the police may detain an occupant of the premises for a limited period, while the search is con-

ducted, so long as there is a sufficient factual basis to expect that at the conclusion of the search they may have probable cause to arrest the individual on felony charges.[13]

We do not believe, however, given the nature of the decision below and of the record before this Court, that it should undertake to decide whether respondent's detention during the execution of the search warrant was lawful. The resolution of that question involves two inquiries: First, was the detention of such duration or character that it should be treated as an arrest requiring probable cause? Second, assuming that it did not cross that line, were the facts and circumstances known to the officers adequate to justify their decision to detain him?

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[13] Contrary to respondent's argument (Br. in Opp. 4), *Ybarra* v. *Illinois*, 444 U.S. 85 (1979), does not support a different conclusion. In that case, a search warrant authorized the police to search the premises of a public tavern and the person of one named individual (the bartender). The Court held that the Fourth Amendment did not permit the officers to search or frisk patrons who happened to be present on the premises when the warrant was being executed, at least where the officers had neither probable cause nor reasonable suspicion that the patrons were involved in criminal activity. The Court did not address the question whether persons connected with premises to be searched pursuant to a warrant, especially private premises, may be detained while the search is being performed. Indeed, in *Rawlings* v. *Kentucky*, *supra*, slip op. 11, the Court described as an "open question" whether a person may be detained temporarily at the scene of suspected drug activity while a search warrant is being obtained. If the legality of a detention to procure a warrant remains unsettled after *Dunaway* and *Ybarra*, we submit that the propriety of detention of a suspect during the execution of a validly issued warrant could not be deemed foreclosed by those decisions.

With respect to the the first of these inquiries, there are some indications that the detention in this case was not of such a nature as to require probable cause. The detention lasted only as long as was necessary to execute the warrant, and, in sharp contrast to *Dunaway*, it merely involved requiring respondent to stay in the living room of his own home and was not undertaken for the purpose of interrogation. Nevertheless, the record appears to be silent as to the precise magnitude of the detention; we are unable to find any indication whether respondent was detained for ten minutes or for two or three hours during the execution for the warrant. Thus, even if the Court agrees with us that the holding of the court below was in error in restricting the permissible duration of a *Terry* stop, it is difficult to tell whether this detention exceeded properly defined boundaries.

Moreover, even were the Court satisfied that the detention here was not of such a character as to require probable cause, we doubt that it should undertake in the first instance to decide the reasonableness of the officers' actions in detaining respondent in the particular circumstances of this case. While the three dissenters below reached and decided the question, the majority had no occasion to do so because of its view that the detention was unlawful wholly without regard to its reasonableness. Unless the Court decides that the exclusionary rule should not be applied in this case regardless of the lawfulness of the detention (see Part II, *infra*), it seems to us preferable to allow the state courts to pass on the reasonableness issue in the first instance.

II. EVEN ASSUMING THAT RESPONDENT WAS DETAINED IN VIOLATION OF THE FOURTH AMENDMENT, THE EXCLUSIONARY RULE SHOULD NOT BE APPLIED TO SUPPRESS THE HEROIN SEIZED FROM HIM FOLLOWING HIS ARREST

Michigan has argued (Pet. 19-22) that even if the police, in detaining respondent, did not comply with the requirements of the Fourth Amendment as set forth in *Dunaway*, the exclusionary rule should not apply here because the officers acted in good faith and with an objectively reasonable basis to believe that their actions were lawful. We note that the Fifth Circuit, sitting en banc, recently recognized a so-called "good faith" exception to the exclusionary rule. *United States* v. *Williams*, 622 F.2d 830, 840-847 (1980), petition for cert. pending, No. 80-5613. The court in *Williams* held that "evidence is not to be suppressed under the exclusionary rule where it is discovered by officers in the course of actions that are taken in good faith and in the reasonable, though mistaken, belief that they are authorized." *Id.* at 840. While there may be substantial reasons for this Court to adopt such a rule in an appropriate case, we do not believe that it is necessary for the Court to resolve that issue here. The search and seizure in this case occurred in October 1974, prior not only to the decision in *Dunaway* v. *New York*, *supra*, but also to that in *Brown* v. *Illinois*, 422 U.S. 590 (1975). In our view, the Michigan Supreme Court erred in applying retroactively the principles it distilled from this Court's decision in *Dunaway*.

As this Court observed in *United States* v. *Peltier*, 422 U.S. 531, 535 (1975), "in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, * * * the

Court has concluded that any such new constitutional principle would be accorded only prospective application." The principal purpose of the exclusionary rule is to deter unlawful police conduct. See *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). Although the rule also has been described as protecting the integrity of the judicial process from the taint of illegally seized evidence, the Court's decisions demonstrate that this justification plays only a limited role in determining whether to apply the exclusionary rule in a particular context. *Id.* at 485. The Court in *Peltier* made it plain that neither the deterrent purpose nor the judicial integrity purpose of the exclusionary rule would be served by retroactive application to searches and seizures that the police did not know, and could not reasonably be charged with knowing, were proscribed by the Fourth Amendment. 422 U.S. at 537-538, 542.

At the time of the seizure in this case, no decision of this Court had held unlawful the detention, on reasonable suspicion, of a suspect for investigative purposes.[14] The question was expressly left open in *Terry* (392 U.S. at 19 n.16), and in *Dunaway* the Court stated (442 U.S. at 202) that it was deciding the question that it had reserved ten years earlier in *Morales* v. *New York*, 396 U.S. 102 (1969). While it may well be that *Dunaway* raised questions about the propriety of detaining a suspect for investigative purposes for more than a brief moment, the police in this

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[14] Similarly, our research has failed to disclose a single reported decision of the Sixth Circuit or the Michigan appellate courts prior to October 1974 that had condemned the type of police conduct involved in this case.

case could not reasonably have known in 1974 that their actions were unlawful.[15]

We note, however, that the Second Circuit, in *United States* v. *Tucker*, 610 F.2d 1007 (1979), applied the Fourth Amendment exclusionary rule to suppress an incriminating statement given by a suspect to the police after he had been detained for several hours in a police station holding pen. The court of appeals noted (*id.* at 1011) that while Tucker's detention had taken place prior to the decision in *Dunaway*, it was subsequent to *Brown* v. *Illinois*, *supra*, in which this Court had condemned the detention of a suspect for custodial interrogation in the absence of probable cause to arrest. The court in *Tucker* concluded that the government had failed to show that the law enforcement officers "could reasonably have believed that their conduct was lawful. Under principles stated in *Brown* and reiterated in *Dunaway*, an involuntary prolonged detention in a police station is an 'arrest' requiring the usual degree of probable cause." 610 F.2d at 1012. Whether or not *Tucker* was correctly decided, we submit that the exclusionary rule should not be applied to suppress the heroin seized from respondent, because here the police could reasonably have believed—as indeed three Justices of the Michigan Supreme Court continued to believe even after *Dunaway*—that their conduct was not in violation of the Fourth Amendment.

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[15] Indeed, even after *Dunaway*, in *Rawlings* v. *Kentucky*, *supra*, this Court indicated that a detention of the sort that occurred here would not necessarily violate the Fourth Amendment (see note 13, *supra*).

CONCLUSION

The judgment of the Michigan Supreme Court should be reversed.

Respectfully submitted.

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